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IN THE

Supreme Court of the United States

No. 143 OCTOBER TERM, 1914.

JOHN B. GLEASON, Petitioner,

vs.

HARRY K. THAW, Respondent.

Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF RESPONDENT.

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Abstract or Statement of the Case.

On June 28, 1906, the Respondent, Harry K. Thaw, was indicted in the City and County of New York, charged with homocide. His first trial began January 23, 1907, and resulted in a disagreement of the jury on the 12th day of April, 1907. The Petitioner, John B. Gleason, was employed by Thaw on or about July 7, 1906. It is alleged in the Petitioner's Declaration that false representations were made by the Respondent to

him in August, November and December following his employment, and that his services were rendered between June 7, 1906, and June 1, 1907, and consisted in assisting Thaw in his trial, which began January 23, 1907, and ended April 12, 1907. That he received in cash from Thaw the sum of $30,000.00, and disbursed for him $10,115.00, leaving $19,885.00, which he, the petitioner, retained and had for fees. (See Record, pages 2, 3 and 4).

Harry K. Thaw filed his petition in bankruptcy in the United States District Court for the Western District of Pennsylvania about August 18, 1908, and was discharged from all of his debts, etc., by the United States District Court for the Western District of Pennsylvania on the 29th day of December, 1910. (See Record, pages 11 and 12). In the schedules of the said Thaw, the claim of the petitioner was scheduled as a claim, the validity of which was, however, disputed. That the petitioner filed his proof, or affidavit of debt, or claim, against the said Harry K. Thaw in the Bankruptcy Court. That it was disputed by the Trustee, and the petitioner was finally allowed the sum of $24,515.00 of his debt. (R., 10). That he was paid a dividend out of the bankrupt's estate upon his claim, of $1,225.75. (R., 10). The Petitioner while attempting to have his claim allowed in the Bankrupt Court, and pending the hearing as to it there, brought suit in the Circuit Court of the United States for the Southern District of New York against Harry K. Thaw. That proceedings on this suit were stayed by the United States District Court for the Western District of Pennsylvania, and that on a petition for review of the order of court staying said suit, the order was affirmed by

the Circuit Court of Appeals for the Third Circuit. (See *Gleason vs. O'Mara, Thaw's Trustee,* 180 Federal Reporter, page 417). That the petitioner then discontinued his said suit in the Circuit Court of the United States for the Southern District of New York, and immediately brought another suit, exactly like the one he discontinued, in the same form and based upon the same facts as those set forth in the prior suit, with this addition, that the services rendered, and for which compensation was sought, was property obtained from the said plaintiff by the said defendant by false pretences, or false representations.

On petition of the Trustee in Bankruptcy for Harry K. Thaw, in the United States District Court for the Western District of Pennsylvania, in which court said bankruptcy proceedings were pending, on the 15th day of March, 1910, the court made an order granting an injunction as prayed for, restraining the said Gleason, as agent, etc., from taking any further proceedings in said action until the question of the discharge of Thaw was determined. The petitioner then filed his petition in the Circuit Court of Appeals for the Third Circuit for a review of this order, and on the hearing in that court the said order was again affirmed.

Before said petition for a review of the order in the Bankruptcy Court was filed, and long before it was decided, to wit, on or about the 6th day of December, 1909, the petitioner brought the suit at bar in the United States Circuit Court for the Southern District of New York, alleging that his professional services are property, in the meaning of the 17th Section of the Bankrupt Act as amended, and that the Respondent,

Thaw, obtained the property, namely, his professional services, from the petitioner by false pretence and false representations. (See his declaration or statement, R., 1, 2, 3, 4 and 5).

Thaw filed answers to the petitioner's complaint. (See R-6, 7, 9, 10 and 11). The petitioner filed replications to the answers of Thaw. (See R-7, 8, 12 and 13). The petitioner filed a demurrer to the respondent's answers. (See R-14). On argument, this demurrer was dismissed in the United States Circuit Court for the Southern District of New York and judgment entered for the respondent dismissing the petitioner's complaint, with costs, Judge Lacombe stating in his opinion, (R-16) that:

> "It is not necessary to discuss the question there raised since both sides agree that the same question was litigated between the same parties in *Gleason vs. Thaw*, 185 Federal Reporter, 345, as decided adversely to the plaintiff. This court will follow the decision of the Court of Appeals."

The Petitioner then took an appeal to the United States Circuit Court of Appeals for the Second Circuit, where the judgment of the United States Circuit Court for the Southern District of New York was affirmed.

Judge Coxe said in his opinion (R-22):

> "We think there is sufficient doubt as to the accuracy of the plaintiff's contention to justify us in following the decision of the Third Circuit,"

which decision was the decision of the Circuit Court of Appeals, rendered in *Gleason vs. Thaw*, 185 Federal, page 345. Then the petitioner obtained a writ of *certiorari*, and the case is before you.

Argument.

I.

Where a Bankrupt, previous to his bankruptcy, obtains the services of an attorney under false pretences or false representations, is that obtaining property under the 17th Section of the Bankrupt Act, for which liability a discharged bankrupt will not be released? The petitioner here confuses the definition of labor with the classifications of labor rendered. While labor may be, and probably is, a species of property which the laborer owns, yet labor performed is not property transferred to another.

In *Gleason vs. Thaw*, 185 Federal Reporter, 347, Mr. Justice Gray of the Third Circuit, properly distinguishes the two, saying:

> "It is one thing to say that a man's right to engage or sell his services according to his own volition may, for the purposes of its protection, be considered a species of property, and quite another to assert that services already rendered by one person to another are to be considered as property, in order to enlarge or change the ordinary remedies by which the debt due from the person to whom such services were rendered may be recovered. The right to labor in any calling or profession in the future may be considered a property right, for the purpose of protection, but no right exists as to labor or services already rendered, and there is nothing to protect, except the right of recovering due compensation therefor. In the latter case, noth-

ing has been transferred from the possession of the one who has rendered the services to the other, for whom the services were rendered. We must not allow ourselves by a subtle verbal casuistry, to confuse a concept of the right to work or render service with the service itself when it has been rendered. The right to render labor or service is one thing; the service itself is quite a different thing."

II.

The representations made by Mr. Thaw after the petitioner's employment cannot be considered, as it cannot be said that they induce the petitioner to be employe. The Petitioner says (R., 2) that on or about July 7th he was told by the respondent:

> "That there had been a family settlement so that the defendant actually owned interests in his father's estate, or derived therefrom property interests more than enough to pay all the expenses of the trial, although these expenses should exceed $500,000, and that the actual value of the defendant's property interests that he could dispose of or mortgage was largely in excess of that sum."

The petitioner does not say that the statement made by Thaw that "there had been a family settlement," was false, but does say that the defendant did not own property and property interests which he could sell or mortgage for $500,000, and that the property and property interests which he could sell or mortgage were much less than $500,000, and these facts were at that time well known to the defendant. Striking out the alleged statement of Thaw's that there had been a family

settlement, there is nothing left in it except Thaw's opinion as to the value of his property. Surely the conjecture that he had enough to pay the expenses although they should exceed $500,000 is nothing but a conjecture, or opinion, and the value of the defendant's property interests is nothing but an opinion; and that he could dispose of same or mortgage same for $500,000 is purely an opinion; and these opinions as to values have never been regarded as false pretences or as misrepresentations, because they are not a statement of facts, but just expressions of opinion.

In the petitioner's denial in the fifth paragraph of his declaration of the facts stated in the fourth paragraph, there is nothing alleged to be false except the opinion of Thaw as to the values of his properties, so that if you consider the alleged false representations they are not false representations at all, nor false pretences, as are contemplated by the 17th Section of the Bankrupt Act, as amended.

The statement alleged to be a false representation in the sixth paragraph of the petitioner's declaration (R., 2), as follows:

> "On or about July 7, 1906, the defendant, for the same purpose, stated to the plaintiff that the defendant was entitled in his own right to a clear annual income of over $30,000, as his own absolutely and without restriction,"

is nothing but the expression of an opinion. It says that the defendant was entitled in his own right to this income. It does not say that he had an income, or that he enjoyed an income of $30,000, but that he was entitled to an income of $30,000. This is not a false state-

ment, and the defendant if on trial for obtaining property of value on such a statement as this, could not be convicted.

All the other alleged false representations were made after the petitioner agreed to perform the legal services for Mr. Thaw, as he has recited in his eighth paragraph of his answer, and cannot be considered as inducements to enter into a contract because they were made after he *had* entered into the contract. Therefore, if you consider the alleged false representations on their merits, conceding for the sake of argument that the services which Thaw obtained from Gleason were property, the same as if it had been money, or credit, we find that they were not false representations or pretences at all. They are nothing but opinions expressed by Mr. Thaw; and Gleason could only recover in assumpsit if Thaw was not in bankruptcy.

III.

The merits of a claim, the justice of a claim receive consideration although it may not be the gist of the case, but according to the petitioners own statements he received $30,000 in cash from Thaw, paid out $10,115, leaving a balance of $19,885, and he has received a dividend from the Bankrupt's estate of $1,225.75, making $21,110.75 in cash, which the petitioner has received for services in a trial lasting from the 23rd of January until the 12th day of April, about two months and nineteen days, resulting in a disagreement of the jury; and while he alleges to have rendered services from his employment from June 7, 1906, until June 1, 1907, or for about a year, it was only a portion of the time, namely,

from July 14th, 1906, to February 7, 1907, that he acted as chief counsel. Just how much he charged as chief counsel and how much he charged after he ceased to be chief counsel does not appear, nor does it appear that he gave the whole of his time to Thaw. The only service which he recites is that rendered during the trial when he was not chief counsel; nor does he state what the services of a chief counsel are worth in murder trials (R., pp. 2-4); but he does give us some little suggestion as to his own idea of the value of legal services, when he states, in (paragraph 6 in affidavit of John B. Gleason, R., p. 13), that Thaw agreed that he should be paid the fees of a first-class attorney. His claim is for $80,000.00 less what he has been paid, or about $60,000.00. We submit that $21,110.75, is much more than lawyers average throughout the country for the trial of a murder case, and I take it that this is true in the City of New York. We submit that there is neither justice nor equity in this claim.

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